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No. 91-943

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In The
Supreme Court of the United States
October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

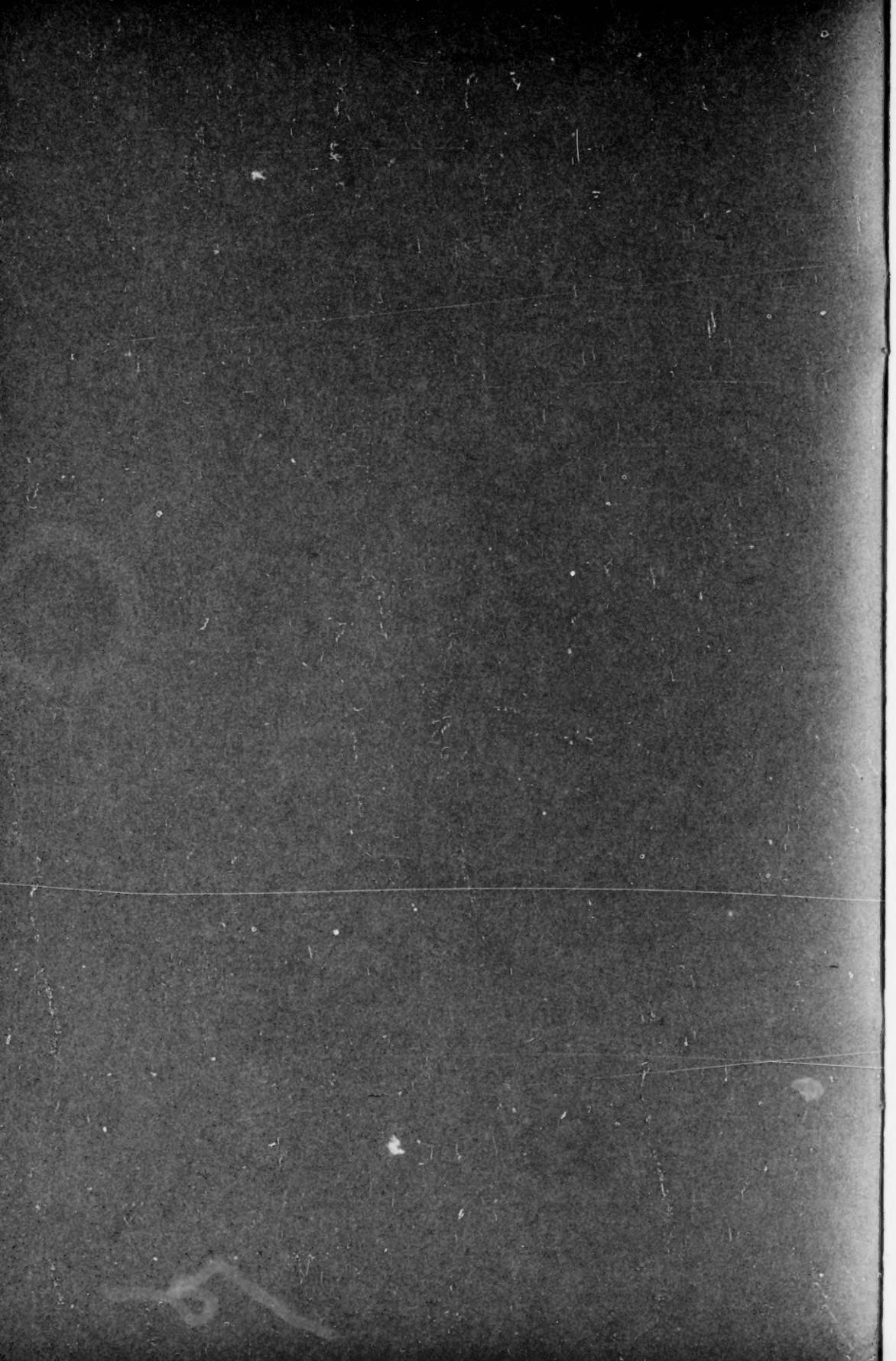
RALPH JOSEPH WALKER,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

JAMES ESPARZA
Attorney for Respondent
One Utah Center
201 South Main Street, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 350-9176



QUESTION PRESENTED

Whether seizure of the respondent, considering the totality of the circumstances, was reasonable.

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BRIEF IN OPPOSITION

Respondent by and through his attorney of record hereby submits his brief in opposition to the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 933 F.2d 812. The opinion of the court of appeals on the denial of the request for rehearing is reported at 941 F.2d 1086. The opinion of the district court is reported at 751 F.Supp. 199.

JURISDICTION

This Court does not have jurisdiction to hear this matter because the writ of certiorari was timely filed. On May 7, 1991, the court of appeals issued its opinion in this matter. On May 29, 1991, the government filed a request for an extension of time to file the request for rehearing en banc. Pursuant to Rule 35 and Rule 40, Fed.R.App.P., a suggestion for a rehearing en banc was filed by petitioner on June 19, 1991. On November 4, 1991, petitioner requested an extension of time to file the writ of certiorari, and Justice White granted the request. Petitioner filed the writ of certiorari on December 11, 1991.

Rule 13.1 of the Rules of the Supreme Court provides:

A petition for writ of certiorari to review a judgment in any case, civil or criminal entered by a . . . United States court of appeals . . . shall be deemed in time when it is filed with the clerk of this Court within 90 days after the entry of the judgment sought to be reviewed.

Rule 13.4 of the Rules of the Supreme Court provides:

The time for filing a petition for writ of certiorari runs from the date of the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (Whether or not they requested the rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. *A suggestion made to a United*

States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule. (emphasis added).

Petitioner seeks to review the decision of the court of appeals dated on May 7, 1991. Pursuant to Rule 13.1 and 13.4, Rules of the Supreme Court, the petition for writ of certiorari should have been filed on or before July 26, 1991. Rule 13.4 provides no expansion of the time period for petitioner because it explicitly does not provide for a tolling the 90 day time period by a request/suggestion for rehearing in banc pursuant to Rule 35(b). Accordingly, this court has no jurisdiction to hear this matter.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

1. On January 10, 1990, respondent, Ralph Joseph Walker, was traveling west on Interstate 70 through Emery County, State of Utah. He was driving a blue 1988 Cadillac Fleetwood Brougham. Officer Richard Graham

of the Emery County Sheriff's Department was traveling east bound on the interstate when he noticed respondent's vehicle approaching. Officer Graham noticed that the traffic was light and that Mr. Walker's vehicle was traveling at a rate of speed faster than the posted speed limit. Officer Graham made a U-turn and pulled the respondent over. App. of petitioner, 26a.

Before coming to a stop behind Mr. Walker's vehicle, Officer Graham conducted a warrants/wants check on the Cadillac and was informed that the Cadillac was not stolen. Officer Graham approached the vehicle and requested Mr. Walker's driver's license and registration. Mr. Walker produced both. App. of petitioner, 26a.

While retaining respondent's driver license and registration, Officer Graham then began to ask respondent a series of questions unrelated to the traffic stop. He asked the respondent if there were any weapons in the vehicle, open containers of alcohol, any controlled substances or paraphernalia of any kind. Officer Graham then questioned respondent whether he was carrying any large quantities of cash. When Officer Graham first approached the vehicle he saw nothing to indicate that the respondent was carrying any of the items about which he questioned respondent about. Officer Graham asked these questions because he was curious.

With Mr. Walker's driver license and registration in his possession, and without further discussing the traffic citation, Officer Graham asked defendant permission to search in the interior of the car. Officer Graham

instructed respondent to proceed to the front of the vehicle where Officer Graham patted down Mr. Walker. Officer Graham searched the interior of the vehicle and then the trunk. Upon opening the trunk Officer Graham observed two packages wrapped in clear plastic tape. The packages appeared to be cocaine. Officer Graham then placed Mr. Walker under arrest. App. of petitioner, 28a.

2. Respondent was indicted for violation of 21 U.S.C. 841(a)(1). He filed a motion to suppress evidence on the grounds that the traffic stop was pretextual, that the scope of the detention was not reasonably related to the purposes of the traffic stop, and that he did not voluntarily consent to the search of his vehicle. The government responded that the stop was not pretextual and that there existed reasonable suspicion to justify the secondary detention. The trial court found that the stop was not pretextual, but held that based on *Terry v. Ohio*, 392 U.S. 1 (1968) and *Florida v. Royer*, 460 U.S. 491 (1983), that the detention was not reasonably related to the circumstances which justified the interference in the first place. The trial court was of the opinion that based on the totality of the circumstances that the questioning was intrusive. App. of petitioner 31a.

3. The government appealed. On appeal the government argued that the encounter between the respondent and Officer Graham was consensual, and that reasonable suspicion existed for the detention. On May 7, 1991, the court of appeals rejected the government's argument that the encounter was consensual and ruled that the district court did not err in finding that the respondent's continued detention was not based on reasonable suspicion.

The court of appeals remanded the case back to the district court for a determination on the issue of consent.

4. On June 19, 1991, petitioner filed a request and suggestion for en banc consideration. The petition was denied. In the request for rehearing the government asserted that bright line rule was being used. The court of appeals denied the request for rehearing, but issued a clarifying opinion responding to the assertion that a bright line rule was being implemented.

ARGUMENT

THERE EXISTS NO SPECIAL OR IMPORTANT REASONS FOR THE COURT TO GRANT THE WRIT OF CERTIORARI

Petitioner's brief on its face fails to articulate any reason for this Court to invoke its discretionary jurisdiction and hear this matter. The court of appeals did not adopt a bright line test to determine the reasonableness of the seizure involved in this case, and the court of appeals should not be faulted for the failure of the petitioner to establish in the record any reasons whatsoever for the behavior of Officer Graham. The court of appeals based on the totality of circumstances determined that seizure of the respondent was unreasonable. The legal principles applied to the facts of this case are well established and there exist no exceptional or important reason for this Court to grant the petition for writ of certiorari.

1. Petitioner suggests that the traffic stop involved in this case is analogous to the road block involved in

Michigan State Police v. Sitz, 110 S.Ct. 2481 (1990). However, the court of appeals found that the type of stop which took place in this case more resembled that of a random stop which the court denounced in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). App. of petitioner 19a. It is beyond dispute that the Fourth Amendment is implicated in this case because stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Amendment, even though the resulting detention is quite brief. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976). All seizures must be reasonably related to the circumstances which justified the interference in the first place. *Terry v. Ohio*, 392 U.S. 1 (1968). And the Fourth Amendment requires that any seizure must be reasonable. *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975). Reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. *United States v. Brignoni-Ponce*, Id. at 880.

In apply the balancing test there must exist some evidence of the public interest the government is attempting to vindicate. In this case the record is bereft of any evidence concerning the public interest petitioner is attempting to vindicate. Petitioner argues that Officer Graham was concerned about narcotics interdiction yet there is no support for this assertion in the record. ("Graham gave no testimony indicating that he suspected the defendant was involved in any criminal activity.") (emphasis added) App. of petitioner 7a. Without evidence identifying and supporting the public interest sought to be vindicated the trial court and the court of appeals was left with

one conclusion to reach. A court of appeals must decide a case based on the record or lack of record before it. After the fact justifications for the police conduct involved in this case does not serve as a basis for review by this Court.

2. Petitioner characterizes the questioning of respondent as brief and as being reasonably related to the purposes of the traffic stop. However, Graham testified that the question or questions were posed to the defendant because he was curious, and he never testified that he asked the questions because he was concerned about the speeding violation. Tr. pg. 24. Officer Graham did testify that he deviated from the procedure in Emery County which is to obtain the driver's license and registration from the citizen and then issue the driver a citation accompanied by a bail schedule directing the citizen where to appear and the amount of fine. Tr. pg. 27.

3. Petitioner further suggests that a minimal degree of intrusion was directed to respondent. The use of these words is a thin disguise for what took place. The officer pulled the respondent over to the side of the road and had possession of his driver's license and registration. Respondent was not free to leave. Respondent testified that he felt that he was going to be arrested at any moment. App. of petitioner pg. 33a. It is not reasonable or credible to suggest that questioning someone stopped for a minor traffic violation ~~about~~ the quantity of money he possesses is not intrusive. Any stop by a law enforcement officer signaling a moving automobile to pull over to the side of the roadway is likely to create substantial anxiety. *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). And questions about how much money a driver has in his possession

undoubtedly would create unwarranted anxiety in even the most law abiding citizen. Furthermore, a police officer conducting a routine traffic stop has no right or justifiable reason to question a citizen about the quantity of money he has in his possession. Furthermore, if Officer Graham was concerned about drunk driving then the proper procedure is to engage in field sobriety test. However, Graham never testified that he was concerned about the possibility of driving under the influence.

Admittedly petitioner is correct that Fourth Amendment cases create difficult line drawing problems for law enforcement officers and the courts. However, what petitioner condemns the court of appeals for is exactly what it is requesting from this Court. While desirable a bright line rule is not workable for Fourth Amendment cases, such as this case, which must be decided from the totality of the circumstances taking into consideration the credibility of the witnesses and the weight to be given to the evidence, together with the inferences, deductions and conclusions to be drawn from the evidence. *United States v. Pappas*, 735 F.2d 1232, 1233.

There is nothing new, exceptional or important concerning this case. The legal principles applied to this case are well established. And clearly the record in this case does not support the assertions of the petitioner. Review by this Court is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES ESPARZA

Attorney for Respondent
One Utah Center
201 South Main Street, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 350-9176

